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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 507th MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 13 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

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The meeting was called to order at 2.10 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377; A/CN.9/XXVI/CRP.5)

Consideration of draft Model Law on Procurement (continued)

Article 37

1. Mr. GRIFFITH (Observer for Australia) said that it might be appropriate for article 37 to become part of article 16, so that single-source procurement was dealt with entirely in article 16 rather than in two articles.
2. Mr. HERRMANN (Secretary of the Commission) said that, during the Commission's previous session, the drafting group had felt that there should be a clear separation between the conditions for using different procurement methods (dealt with in chapter II) and the procedures for procurement methods other than tendering (dealt with in chapter IV). There was little to be said about procedures in the case of single-source procurement, but for the sake of consistency it had been felt that an article concerning that method should appear in chapter IV.
3. Mr. WALLACE (United States of America) suggested that, like article 36 (3), article 37 conclude with a phrase concerning the reliability of the supplier or contractor. He could go along with the words "considered qualified", which had been considered at the previous meeting in connection with article 36 (3), provided it was understood that, in the present case also, they did not imply that all the provisions of articles 6 and 7 would come into play.
4. Mr. WALSER (Observer for the World Bank) said that, in his opinion, the words "considered qualified" did not mean that the procuring entity would have to ascertain the qualifications of suppliers and contractors or engage in prequalification proceedings. Perhaps a phrase like "that is qualified as defined in article 6 (2)" at the end of article 37 would be appropriate as it appeared to be generally agreed that article 6 (2) should apply whatever procurement method was used.
5. It was surprising that article 37 referred back to article 16 ("Conditions for use of single-source procurement"), while articles 33-36 did not refer back to articles 14 and 15. Perhaps the appropriate references should be inserted in articles 33 to 36.
6. Mr. LEVY (Canada) felt that one could safely add the phrase "that is considered reliable by the procuring entity" at the end of article 37.
7. Mr. SAHAYDACHNY (Secretariat) suggested that, if such a phrase was added, the Commission might wish the drafting group to devise language that would ensure that, in assessing the reliability of a supplier or contractor, the procuring entity did not consider factors other than those whose consideration was envisaged in article 6.

8. Mr. JAMES (United Kingdom) said that, as he understood it, the Commission wished to allow the procuring entity to assess reliability, but not by means of the formal procedures provided for in article 6.
9. Mr. SAHAYDACHNY (Secretariat) said that the Working Group had moved article 6 into chapter I, "General provisions", because it had felt that it should apply to all methods of procurement. In any case, perhaps there was not much difference between the information which the procuring entity might seek pursuant to article 6 and the information which it might seek in assessing reliability in connection with requests for quotations and with single-source procurement.
10. Mr. WALLACE (United States of America), pointing out that the enumeration in article 6 (2) (a) actually included "reliability", said that in the wording which was being sought a distinction should be made between article 6 and the criteria set forth in subparagraphs (2) (a) to (e) of that article.
11. Mr. LEVY (Canada) felt that in the case of requests for quotations and single-source procurement it was not necessary to refer to the criteria set forth in subparagraphs (2) (a) to (e) of article 6.
12. Perhaps one could add at the end of article 6 (1) a phrase like "except for procurement made in accordance with articles 36 and 37".
13. Mr. TUVAYANOND (Thailand) said he understood that article 6 applied to all the procurement methods envisaged in the Model Law. Accordingly, he felt that articles 36 and 37 should be linked in some way to article 6, paragraph (2) of which was in any case not mandatory - as made clear by the words "the procuring entity may require" in the *chapeau*.
14. Mr. WALSER (Observer for the World Bank) said that use of the word "reliable" might open the way to subjective judgements and that he did not see why the criteria set forth in subparagraphs (2) (a) to (e) of article 6 should not apply to all procurement methods. The procurements envisaged by paragraph (2) were not very complicated.
15. Ms. PIAGGI-VANOSSE (Argentina) supported the views expressed by the observer for the World Bank.
16. Mr. LEVY (Canada), agreeing that the words "the procuring entity may require" in the *chapeau* of paragraph (2) of article 6 meant that that paragraph was not mandatory, suggested that article 36 (3) and article 37 might be drafted in such a way as to convey the idea that "the procuring entity may have regard to the criteria set forth in article 6 (2) (a) to (e) if it so desires".
17. Mr. TUVAYANOND (Thailand), supporting the suggestion made by the representation of Canada, suggested that the expression "*mutatis mutandis*" be incorporated into the wording in question.
18. Mr. JAMES (United Kingdom) suggested for article 36 (3) and article 37 a formulation on the lines of "supplier or contractor that is considered by the procuring entity to satisfy such of the criteria set forth in

(Mr. James, United Kingdom)

subparagraphs (a) to (e) of article 6 (2) as the procuring entity considers appropriate in the circumstances".

19. Mr. TALICE (Uruguay) suggested that, given the non-mandatory character of article 6 (2), one might speak in article 36 (3) and article 37 of "full or partial compliance with the criteria set forth in article 6 (2)".

20. The CHAIRMAN suggested that the Commission request the drafting group to devise wording on the lines of "supplier or contractor that is considered reliable and satisfies such requirements as stipulated in article 6 (2) (a) to (e)".

21. Mr. LEVY (Canada) asked whether the Commission wished to redraft article 6 (1) so as to exempt requests for quotations and single-source procurement from the scope of application of article 6.

22. Mr. TUVAYANOND (Thailand) said that, in his opinion, article 6 should remain as it stood.

23. Mr. HERRMANN (Secretary of the Commission) said that the inclusion in article 36 (3) and article 37 of wording on the lines of "the procuring entity may have regard to the criteria set forth in article 6 (2) (a) to (e) if it so desires" would result in doubts about the position as regards procurement methods other than requests for quotations and single-source procurement.

24. Mr. WALLACE (United States of America) suggested that no phrase about reliability be added to article 37 and that the words "and that is considered reliable by the procuring entity" in article 36 (3) be deleted.

25. Mr. LEVY (Canada) supported the suggestion.

26. Mr. JAMES (United Kingdom) said that the suggestion made by the representative of the United States of America would sever the link between article 36 (3) and article 37 on one hand and article 6 on the other. If there was to be no reference to reliability in article 36 (3) and article 37, there should be a reference to qualifications.

27. Mr. TUVAYANOND (Thailand) said he would like to see a reference to reliability in both article 36 (3) and article 37.

28. Mr. WALSER (Observer for the World Bank), agreeing with the United Kingdom representative, said he believed that there should be a reference to qualifications not only in article 36 (3) and article 37, but also in articles 33 to 35.

29. Ms. PIAGGI-VANOSI (Argentina) supported the United States representative's suggestion that there should be no reference to reliability in article 36 (3) and article 37 and the suggestion made by the representative of Thailand with regard to the addition of "mutatis mutandis".

30. Mr. WALLACE (United States of America) suggested asking the drafting group to devise a form of words for article 6 which would authorize the procuring entity to have maximum regard to the criteria set forth in subparagraphs (2) (a) to (e) of that article.

31. The CHAIRMAN said that the drafting group could be asked to redraft article 6 (1). The Commission still had to decide whether there should be references to reliability in article 36 (3) and article 37.

32. Mr. TUVAYANOND (Thailand) said he would not press his view if article 6 could be construed as permitting the procuring entity to take account of the reliability of the supplier or contractor.

33. The CHAIRMAN asked the United States representative whether, in his opinion, a supplier or contractor could meet the standards of article 6 (2) (a) to (e) without being reliable.

34. Mr. WALLACE (United States of America) said he thought that article 6 could be modified in such away as to address the point made by the representative of Thailand and the point made by the observer for the World Bank.

35. Mr. TALICE (Uruguay) suggested that, if the last phrase of article 36 (3) was to be deleted, article 6 (1) be modified so as to indicate that all procurement methods fell within the scope of application of article 6.

The meeting was suspended at 3.35 p.m. and resumed at 4.15 p.m.

36. Mr. SAHAYDACHNY (Secretariat) proposed the insertion, near the beginning of article 6, of a sentence on the lines of "No procurement shall be entered into unless the supplier or contractor is qualified". He also proposed that paragraph (2) include a provision on the lines of "Suppliers or contractors shall be deemed qualified to perform the procurement contract if they meet such of the following criteria as the procuring entity deems appropriate in the particular case", followed by the criteria set forth in subparagraphs (2) (a) to (e).

37. The intention behind those proposals was that all methods of procurement should be covered, but that the procuring entity should not be required to carry out exhaustive assessments of qualifications. There would be due regard to the importance of reliability in the context of requests for quotations and single-source procurement without, however, any reference to reliability in article 36 (3) or article 37.

38. Mr. LEVY (Canada) and Mr. TUVAYANOND (Thailand) welcomed the proposals.

39. The CHAIRMAN took it that the Commission wished to adopt article 37 in the light of those proposals.

40. It was so decided.

41. Mr. WALLACE (United States of America), recalling the decisions taken by the Commission at its previous meeting regarding article 32 (6) and article 11 (1) (b), said that the Commission appeared not to have dealt with the comment of the Japanese Government (in document A/CN.9/376/Add.2) that "this requirement of publication should ... be extended to other methods of procurement, including single-source procurement".

Articles 15 bis and 36 bis

42. The CHAIRMAN, recalling the discussion on article 18 (3) during the Commission's 502nd meeting, opened for discussion the articles on restricted tendering proposed by the Inter-American Development Bank in document A/CN.9/XXVI/CRP.5. He said that, if the two articles were adopted, article 18 (3) would be deleted.

43. Mr. SAHAYDACHNY (Secretariat) said that, if the two articles were adopted, their wording would need to be aligned with the terminology used elsewhere in the Model Law; unless matters of substance were involved, that task could be left to the drafting group.

44. It might be helpful to compare paragraphs (a) to (d) of article 15 bis with paragraph 3 of the commentary on article 18 in the Guide to Enactment (document A/CN.9/375). In that connection, he recalled that during the Commission's 502nd meeting several members had felt that the phrase "for reasons of economy and efficiency" in article 18 (3) should be made more explicit.

45. Mr. MORAN BOVIO (Spain), commending the idea of including articles on restricted tendering in the Model Law, said that details of wording could be settled by the drafting group.

46. Mr. LEVY (Canada) said he had doubts about making restricted tendering so visible, but if the Commission wished to accept the proposals before it, he would not object.

47. He presumed that the last phrase of paragraph (2) of article 36 bis - "except that publicity requirements shall not apply" - was intended to refer to the early stages of tendering, since publicizing of the outcome was required with all other procurement methods.

48. Mr. GRIFFITH (Observer for Australia) said that, like the Canadian representative, he was not sure about the wisdom of including separate articles on restricted tendering. The draft Model Law already contained provisions relating to restricted tendering which the Commission had discussed at length without reaching agreement. In such circumstances, he preferred that the existing language be left as it stood since it had the sanction of the Working Group.

49. If the Commission did decide to adopt the two articles, the reference to "small quantities" in paragraph (d) of article 15 bis should be brought into line with the corresponding phrase in paragraph (b) of article 17, which the Commission - at its 501st meeting - had decided to change from "low amount or value" to "small quantity or low monetary value".

50. Mr. AZZIMAN (Morocco), commending the proposal submitted by the Inter-American Development Bank, said that it would result in the Model Law's having a more logical structure - open tendering, the preferred method, accompanied by certain derogations dependent on specific conditions.

51. Noting that the language of the proposed articles would need to be harmonized with that employed elsewhere in the Model Law, he suggested that in paragraph (c) of article 15 bis and paragraph (2) of article 36 bis "public tendering" be replaced by "open tendering" (in contrast to restricted tendering) and that in paragraph (2) the word "prior" be inserted before "publicity".

52. Mr. JAMES (United Kingdom) said he too was not sure whether the introduction of two new articles was the best way of dealing with restricted tendering.

53. If article 15 bis was to be adopted, it would require a paragraph (e) dealing with "any other exceptional cases". He was not convinced that paragraphs (b) and (c) of article 15 bis provided valid reasons for recourse to restricted tendering. Nor did he see the point of the reference to "small quantities" (or something on the lines of "small quantity or low monetary value") in paragraph (d) given the basic principle that restricted tendering was justifiable only if the value of the contract and the costs of the procurement procedure were so out of balance as to render open tendering undesirable.

54. The second sentence in paragraph (1) of article 36 bis would need to be examined in the light of the decision taken earlier in the meeting with regard to article 6.

55. Mr. TUVAYANOND (Thailand) agreed with the representative of the United Kingdom about the need, in article 15 bis, for a paragraph (e) dealing with "any other exceptional cases".

56. Regarding paragraph (b) of article 15 bis, he considered the words "duly justified" to be unnecessary; it was for the national authorities of enacting States to decide what constituted an "urgent need".

57. Like the observer for Australia, he did not like the formulation "small quantities" in paragraph (d) of article 15 bis; perhaps that paragraph might be amended to read "the procurement is of minor significance".

58. With regard to paragraph (1) of article 36 bis, he questioned the use of the word "reputable" in the second sentence as it might lead to discrimination against new firms to the benefit of established ones. He thought that "reasonable" would be more appropriate than "sufficient" in the third sentence.

The meeting rose at 5.05 p.m.